U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RANDAL G. VAN ES and DEPARTMENT OF JUSTICE, IMMIGRATION & NATURALIZATION SERVICE, U.S. BORDER PATROL, Calexico, CA

Docket No. 03-761; Submitted on the Record;
Issued August 14, 2003

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether appellant sustained greater than a nine percent impairment to his right upper extremity, for which he received a schedule award.

On October 18, 2001 appellant, then a 28-year-old border patrol agent, filed a notice of traumatic injury and claim for continuation of pay/compensation alleging that on that date, he injured his right shoulder when, while checking the oil level of a "humvee," the hood fell, and as he attempted to catch it with his right hand, he pulled his shoulder. By letter dated December 13, 2001, the Office of Workers' Compensation Programs accepted appellant's claim for right shoulder strain/impingement syndrome and authorized a right shoulder arthroscopy. On March 14, 2002 appellant underwent an arthroscopy of his right shoulder with subacromial decompression and extensive debridement.

On June 16, 2002 appellant filed a claim for a schedule award.

By letter to appellant's physician, Dr. Thomas Harris, an orthopedic surgeon, dated July 16, 2002, the Office requested that he evaluate appellant's permanent partial impairment to his right shoulder/right upper extremity pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (fifth edition). Dr. Harris responded in an August 5, 2002 report wherein he indicated that appellant's status was "post small anterior labrum tear and impingement syndrome, right shoulder, with mild instability," and that appellant had reached maximum medical improvement. He noted that, on a scale of 0 to 10 with 0 being minimal and 10 being incapacitated, appellant rated his pain as 2 at rest and 5 with activity. Dr. Harris indicated that sensation was normal and equal bilaterally. With regard to measurements of motion for appellant's right shoulder, he indicated extension was 30 degrees, flexion was 170 degrees, internal rotation was 50 degrees, external rotation was 80 degrees, abduction was 150 degrees and adduction was 38 degrees. Dr. Harris further noted:

> "In my opinion, the patient has a ratable impairment using the A.M.A., *Guides*, fifth edition. For the patient's right shoulder, using page 498, paragraph 16.7, the

patient has a 25 percent impairment of the right upper extremity secondary to recurrent anterior labrum tear and impingement syndrome."

The Office referred appellant's case complete with the report of Dr. Harris to the Office medical adviser for an opinion with regard to schedule award. In a November 18, 2002 report, Dr. Arthur S. Harris, a Board-certified orthopedic surgeon, applied the A.M.A., *Guides* (fifth edition) to the findings in the report of Dr. Thomas Harris and noted:

"For the purposes of [s]chedule [a]ward, the claimant has one percent impairment for loss of shoulder flexion (Figure 16-40/[p]age 476). The claimant has one percent impairment for loss of shoulder abduction (Figure 16-43/[p]age 477). The claimant has one percent impairment for loss of shoulder abduction (Figure 16-43/[p]age 477). The claimant has one percent impairment for loss of shoulder adduction (Figure 16-43/[p]age 477). The claimant has two percent impairment for loss of shoulder internal rotation (Figure 16-46/[p]age 479). This results in six percent impairment for loss of motion.

"The claimant has Grade 3 pain/decreased sensation that interferes with some activity 60 percent (Table 16-10/page 482) of the axillary nerve/deltoid muscle 5 percent (Table 16-15/page 492), resulting in three percent impairment of the right upper extremity for pain that interferes with some activity.

"Utilizing combined values for six percent impairment for loss of motion and three percent impairment for pain which interferes with function, this results in nine percent impairment of the right upper extremity.

"As such, the claimant has nine percent impairment of the right upper extremity. The nine percent impairment of the right upper extremity is the sole impairment of the right upper extremity resulting from the accepted work injury of October 18, 2001. The date of maximum medical improvement is August 5, 2002, when the claimant was felt to have reached a permanent and stationary status by his treating physician, Dr. Harris."

By decision dated December 23, 2002, the Office issued a schedule award for a nine percent impairment to appellant's right upper extremity.

The schedule award provisions of the Federal Employees' Compensation Act[1] and its implementing regulation,[2] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use of specified members or functions of the body. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage loss of use.[3] However, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal

[1] 5 U.S.C. § 8107.

[2] 20 C.F.R. § 10.404 (1999).

[3] 5 U.S.C. § 8107(c)(19).

justice under the law to all claimant's good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[4]

In the instant case, Dr. Thomas Harris indicated that appellant had a 25 percent impairment to his right upper extremity secondary to recurrent anterior labrum tear and impingement syndrome. Dr. Harris refers to page 498, paragraph 16.7 of the A.M.A., *Guides* as the basis for his determination. Dr. Arthur S. Harris, on behalf of the Office, carefully applied the findings in Dr. Thomas Harris' report to the A.M.A., *Guides* and determined that appellant had a 9 percent impairment of the right upper extremity. Consequently, there existed a conflict in the medical evidence.

Section 8123(a) of the Act provides that "[i]f there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."[5] To resolve this conflict, the Office should have referred the case record and a statement of accepted facts to an appropriate medical specialist for an impartial medical evaluation and opinion pursuant to 5 U.S.C. § 8123(a).[6]

On remand, the Office should refer appellant, together with a statement of accepted facts and the case record, to an appropriate impartial medical specialist for an examination. The specialist should make a determination as to the extent of appellant's impairment to his right upper extremity. After such further development as the Office deems necessary, a *de novo* decision should be issued.

[4] *See* 20 C.F.R. § 10.606(b)(2).

[5] *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

[6] The Board notes that, although Dr. Thomas Harris refers to a specific page and paragraph of the A.M.A., *Guides* to support his conclusion, the Board has been unable to determine exactly how he arrived at his conclusion that appellant had a 25 percent impairment of his right upper extremity. The Office medical adviser's opinion, on the other hand, is clear as to how he arrived at his calculation that appellant had a nine percent impairment of his right upper extremity. Nevertheless, it is well established that proceedings under the Act are not adversarial in nature nor is the Office a disinterested arbiter. *John J. Carlone*, 41 ECAB 354 (1989); *Dorothy L. Sidwell*, 36 ECAB 699 (1985). The Office should have provided Dr. Thomas Harris a further opportunity to explain his opinion. Nevertheless, as Dr. Thomas Harris does cite to the A.M.A., *Guides*, his opinion is sufficient to create a conflict in the evidence.

The decision of the Office of Workers' Compensation Programs dated December 23, 2002 is hereby set aside and the case is remanded to the Office for further action in accordance with this decision of the Board.

Dated, Washington, DC
August 14, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member